



January 11, 2019

Monet Vela  
Office of Environmental Health Hazard Assessment (OEHHA)  
1001 I Street, 23rd Floor  
P. O. Box 4010  
Sacramento, California 95812-4010  
Telephone: 916-323-2517  
Fax: 916-323-2610  
e-mails: [monet.vela@oehha.ca.gov](mailto:monet.vela@oehha.ca.gov)  
[P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

*Sent via e-mail and electronic submission*

**Re: Comments on Proposed Amendments to Article 6, Clear and Reasonable Warnings,  
Section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings**

Dear Ms. Vela,

*As You Sow* submits the following comments on OEHHA's proposed amendments to Article 6, Clear and Reasonable Warnings, section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings.

While we applaud OEHHA's intent to clarify the existing regulations, in general, we are troubled by OEHHA's proposed amendments to California Code of Regulations, title 27, section 25600.2, regarding responsibility to provide consumer product exposure warnings.

As discussed in detail below, we believe that the proposed amendments to subsections 25600.2(b)-(c) are contrary to OEHHA's statutory authority. We are concerned that the proposed amendments to subsections 25600.2(b)-(c) will allow a large number of products to evade the Proposition 65<sup>1</sup> requirement to provide individuals with required warnings, resulting in unwarned consumer exposures to listed chemicals in violation of Proposition 65. We are equally concerned that the proposed amendments to subsection 25600.2(f) create a new exemption to warning requirements by retail sellers that is not authorized by the Act. Instead of finalizing the current proposed amendments, we urge OEHHA to take a closer look at the fundamental problems that we have identified in our comments.

---

<sup>1</sup> The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.5 *et seq.* (referred to herein as "Proposition 65" or "the Act").



## DISCUSSION

### **I. OEHHA's Proposed Amendments to Subsection 25600.2(b) and (c) Violate Proposition 65's Warning Requirement, and Exceed OEHHA's Statutory Authority.**

At the outset, we reiterate our concern with California Code of Regulations, title 27, section 25600.2, that we raised in prior comments. As OEHHA is aware, at the heart of Proposition 65 is its requirement that businesses provide a “clear and reasonable” warning before “knowingly and intentionally” exposing consumers to a listed carcinogen or reproductive toxin. (Health & Safety Code § 25249.6). Subsection 25600.2(b) currently authorizes a manufacturer, producer, packager, importer, supplier, or distributor of a product (collectively referred to herein as “producer” or “producers”) to comply with the warning requirement by either: (1) “providing a warning on the product label or labeling that satisfies Section 25249.6 of the Act,” or (2) “by providing a written notice directly to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act.” (27 Cal. Code Regs., tit. 27, § 25600.2(b)). The latter provision is contrary to Proposition 65, which requires that warning regulations place the obligation to provide warnings on the producers to the extent practicable. (Health & Safety Code § 25259.11(f)).

OEHHA's proposed amendments to subsections 25600.2(b) and (c)(1) would compound this problem by allowing producers to meet their Proposition 65 duty by simply providing a written notice to either “the authorized agent for the business to which they are selling or transferring the product” or “the authorized agent for a retail seller.” The proposed amendments inappropriately limit producers' responsibility to comply with Proposition 65 by allowing a simple pass-through of materials to intermediaries to satisfy their duties under the law, whether the warning ever makes it to the consumer or not.

#### **A. The Proposed Amendments to Subsections 25600.2(b) and (c)(1) Contradict Proposition 65 by Effectively Exempting Producers from the Duty to Provide Warning to Individuals.**

OEHHA's proposed amendments to California Code of Regulations, title 27, subsections 25600.2(b) and (c)(1) are highly problematic, because they allow producers to discharge their statutory duty under Proposition 65 without any guarantee that consumers of the products will receive warnings regarding their exposure to listed chemicals. The proposed amendments authorize a producer to discharge its legal obligation to provide a Proposition 65 warning simply by providing a written notice to the next downstream business or intermediate buyer, ending the minimal remaining requirement that the producer provides written notice directly to, and obtains written confirmation directly from, a retail seller that is subject to Proposition 65.

The amendments create a significant loophole in the warning system created by Proposition 65. Under the proposed amendments, a producer who is subject to Proposition 65 can claim it has met its legal duty of providing warnings so long as it has provided the necessary materials and obtained written confirmation from an intermediate buyer, even if the product is ultimately passed on to a small distributor, or sold to consumers via a small retail seller, not subject to the Act and with no legal duty to provide any warning. This is particularly troubling in today's e-commerce world where many consumer products are sold by small online retailers. OEHHA must revise the proposed amendments to prevent



such system failures, as all businesses in the supply chain are prohibited from knowingly and intentionally exposing individuals to listed chemicals under Proposition 65.

Moreover, by allowing producers to meet their legal warning requirements by simply passing warning materials to the next downstream business entity, without obligation to ensure warnings are actually being provided to consumers, the proposed amendments effectively create an exemption from producers' duty to provide warning to individuals. In this way, the proposed amendments exceed OEHHA's regulatory authority.

Proposition 65 instructs that the regulations implementing Proposition 65's warning requirements should "minimize burden on retail sellers," and that "[the warning regulations] shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller." (Health & Safety Code § 25249.11(f)). The proposed amendments do not in any way minimize the burden on retail sellers of consumer products; their only goal appears to be to benefit producers. As OEHHA explains in the Initial Statement of Reasons (ISOR), the proposed amendments are made " . . . because in some situations, the original manufacturer, distributor, importer, or others in the chain of commerce may not know where or by whom the product will ultimately be sold to a consumer."<sup>2</sup> (ISOR, p. 5). While this may be true, the appropriate resolution is not to further weaken the warning obligations of producers, but to withdraw the prior amendments which created the problem. Alternatively, producers can choose not to sell to distributors that cannot verify the ultimate retailer; provide on-product warnings to ensure that warnings are provided to consumers; or develop other solutions.

The law's preference that the producer provide warnings is reasonable. Producers choose what chemicals to use in their products, and have the ability to place on-product warnings at the beginning of the supply chain. If producers are relieved of liability, it would be a rational decision not to provide on-package warnings, pushing all responsibility to downstream entities. As more and more producers choose to pass off warning obligations, the burden on retail sellers and the distribution chain will grow, increasing the risk that mistakes will be made, warnings will not be passed on timely, and that consumers will be left without warning where distributors, other intermediate business entities, and/or retail sellers are, or claim not to be, subject to the terms of the Act.

Accordingly, we ask that OEHHA withdraw the proposed amendments to subsections 25600.2(b) and (c)(1), and instead require that a producer provide direct warning to consumers unless it is not feasible to do so. Alternatively, OEHHA should revise the proposed amendments such that, where a producer is unaware or unsure of the identity of the ultimate retail seller, the producer remains liable for any failures to provide warnings for its products, or otherwise must ensure that warnings are provided to

---

<sup>2</sup> This statement, rather than a justification for the proposed amendment, underscores the benefit of on-package warnings when possible given that neither the manufacturer, nor OEHHA can be sure that intervening supply chain entities will have any responsibility to provide warnings to California consumers under the law. The potential that warnings may be placed on a small number of products that eventually make their way out of California, to protect consumers outside of the state, does not justify the likely abrogation of warnings to California consumers that this amendment may cause.



the ultimate consumer of its products, including requiring that distributors and retail sellers provide proof of compliance.

## **B. The Proposed Amendment Text Is Unclear.**

As discussed above, the proposed amendments to subsections 25600.2(b) and (c)(1) are fundamentally flawed. Nonetheless, should OEHHA insist on moving forward with the proposed amendments, they are also ambiguous. Specifically, OEHHA is proposing to modify section 25600.2(b) to authorize producer compliance with Proposition 65 by “providing a written notice directly *to the authorized agent for the business which they are selling or transferring the product* or to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act.” (OEHHA’s proposed insertion in italics).

The proposed language as written can be read to authorize producers to simply pass on the written notice and warning materials to the business to which a producer is selling or transferring its product, without verifying whether the business is subject to section 25249.6 of the Act. We recommend that OEHHA make clear that producers can only comply with Proposition 65 via written notice to a business that is subject to section 25249.6 of the Act. The amendment should thus read, “by providing a written notice directly *to the authorized agent for the business to which they are selling or transferring the product **which has been verified to be subject to Section 25249.6 of the Act***, or to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act.” (OEHHA’s proposed insertion in italics; As You Sow’s suggested amendments in bold and in italics). OEHHA should make the same edits where necessary throughout subsections 25600.2(b) and (c)(1).

## **II. OEHHA’s Proposed Amendment to Subsection 25600.2(c)(2) Clarifying that Written Notice May Be Served on a Business’s Legal Agent for Service of Process Only Benefits Producers.**

OEHHA is also proposing to clarify, in subsection 25600.2(c)(2), that where a business has not designated an authorized agent, a producer may serve the written notice and materials authorized under subsection 25600.2(b) on a business’ legal agent for service of process. While we have no objection to the proposed clarification, we repeat the same concern, detailed above, that the proposed amendment only serves the interest of making it easier for producers to pass on written notices and warning materials. The proposed amendment is thus contrary to Section 25249.11(f) of the Act, which requires the warning regulations to place the duty to warn on the producers “to the extent practicable.” (Cal. Health & Safety Code § 25249.11(f)).

## **III. Subsection 25600.2(e)(5) Inappropriately Absolves Retail Seller of Liability for Knowingly and Intentionally Exposing Individuals to Listed Chemicals Without a Warning, in Violation of Proposition 65.**

We further suggest that OEHAA revisit subsection 25600.2(e)(5) of the Code of Regulations. While Proposition 65 instructs that OEHHA must promulgate regulations that, “to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller,” it does not authorize OEHHA to excuse retail sellers from liability for knowingly and intentionally exposing individuals to listed chemicals without a warning where an upstream entity is



subject to Proposition 65 and is amenable to jurisdiction in California state courts. (Health & Safety Code § 25259.11(f)).

Subsection 25600.2(e)(5) provides that a retail seller is responsible for providing the warning for a consumer product exposure only if: (1) the retail seller “has actual knowledge” of the exposure; “and” (2) there is no upstream entity in the chain of distribution who is both a “person in the course of doing business” under Proposition 65 and has a designated agent for service of process or a place of business in California. Some retail sellers have interpreted this provision to allow them to knowingly and intentionally expose consumers to listed chemicals in consumer products without a warning, where there is a single entity in the upstream supply chain that falls within the purview of Proposition 65, even if that upstream entity has not provided adequate warnings. (Cal. Code Regs., tit. 27, § 25600.2(e)(5)). Thus, OEHHA should take this opportunity to revise section 25600.2(e)(5) to make clear that a retail seller with knowledge of an unwarned consumer product exposure has an obligation to provide a warning irrespective of the identity of the product’s manufacturer, importer, distributor or supplier.

#### **IV. OEHHA’s Proposed Amendments to Subsection 25600.2(f) Should Be Revised to Require the Same Level of Specificity for Product Identification as Required for a Notice of Violation.**

OEHHA is proposing changes to California Code of Regulations, title 27, subsection 25600.2(f) to clarify the meaning of the phrase “actual knowledge” as used in the current regulatory text. First, OEHHA proposes amending subsection 25600.2(f) to clarify that a retail seller is deemed to have “actual knowledge” of a potential consumer product exposure requiring a Proposition 65 warning, and may be liable under Proposition 65, when the retail seller has “specific knowledge of the consumer product exposure *with sufficient specificity for the retail seller to readily identify the product that requires a warning.*” (OEHHA’s proposed amendment in italics). Second, OEHHA is proposing amending subsection 25600.2(f) to state that a retail seller is deemed to have “actual knowledge” where information concerning a potential consumer product exposure is “received by the authorized agent or a person whose knowledge can be imputed to” the retail seller.

While we agree with OEHHA’s proposed amendment clarifying who can receive information regarding potential consumer product exposure on behalf of a retail seller, the proposed amendment creates an exception to the duty to warn that contradicts existing Proposition 65 jurisprudence. Section 25249.6 of the Act states that: “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.” (Health & Safety Code § 25249.6). Current regulations explain that an exposure is “knowing” where a party has “knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring.” (Cal. Code Regs., tit. 27, § 25102(n)). This knowledge may be actual or constructive. (See, e.g., Final Statement of Reasons Revised (November 4, 1988) for former Cal. Code Regs., tit. 22, § 12201.) (stating that the “Agency interprets the requirement that exposure be ‘knowing and intentional’ to include exposures about which there is constructive knowledge.”). As drafted the proposed amendment may be interpreted to allow a retail seller to sit back and wait for specific communication “received by the authorized agent or a person whose knowledge can be imputed to” the retail seller,



even if it otherwise has knowledge that it is selling a product for which a warning is required through other means, such as information reported in mass or social media, governmental sources, or formal and informal consumer communication.<sup>3</sup> Proposition 65 does not allow a retail seller to knowingly and intentionally expose individuals to listed chemicals without a warning.

We are concerned that OEHHA's proposed amendment may be interpreted as creating a heightened level of specificity to enforce Proposition 65 against a retail seller. OEHHA's existing regulations state that a notice of violation alleging a consumer product exposure only needs to provide "sufficient specificity to inform the recipient of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." (Cal. Code Regs., tit. 27, § 25903(b)(2)(D)). OEHHA's proposed amendment, requiring information with "sufficient specificity for the retail seller to readily identify the product," may be interpreted to set a higher bar, thus creating inconsistent application of the Act.

Accordingly, we recommend that OEHHA withdraw the proposed amendment to subsection 25600.2(f) defining "actual knowledge" as specific knowledge of the consumer product exposure "with sufficient specificity for the retail seller to readily identify the product that requires a warning," or replace that language with the current language set forth in the California Code of Regulations, title 27, section 25903(b)(2)(D).

### CONCLUSION

Proposition 65 places the legal obligation to provide warnings to consumers on all businesses in the supply chain. As discussed above, OEHHA's proposed amendments are contrary to Proposition 65's statute and existing regulations, and if approved, will create a broken system where that warning can simply be passed on from one business entity to another, whether or not that intervening entity has responsibility for compliance. We believe that a system in which all entities have potential liability will best ensure that the consumer ultimately receives the warning required by law. We hope OEHHA will meaningfully consider our input.

Thank you for providing this opportunity to comment on these important issues.

---

<sup>3</sup> OEHHA's proposed amendment to subsection 25600.2(f) (in italics below) states:

For purposes of subsection (e)(5), "actual knowledge" means specific knowledge of the consumer product exposure *with sufficient specificity for the retail seller to readily identify the product that requires a warning, and that is* received by the authorized agent or a person whose knowledge can be imputed to the retail seller from any reliable source.

(emphasis added in bold). This can be interpreted to greatly limit when and how a retail seller has "actual knowledge" of consumer product exposure.



AS YOU SOW

Sincerely,

Sylvia Wu  
Staff Attorney  
*As You Sow*